A Role for the WTO in International Merger Control

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Andre Fiebig*

I. INTRODUCTION

In the last several years, the creation of an international competition law regime has gained renewed attention. This is primarily due to the globalization of businesses and the difficulties national competition regulators have experienced in policing business activity in the new economy. Proposals for some form of supranational competition law have been around since the League of Nations in the first part of the prior century. Although none of these proposals has been implemented, the "antitrust internationalists" have not given up hope despite significant reservations expressed by the United States.

The proposals concerning international competition law have traditionally been focused on cartel behavior rather than structural restraints of competition. Given the political value of merger approval decisions, it was apparent that it would be difficult, if not impossible, to achieve an international consensus on the control of mergers. Recently, however, attention has shifted to the possible regulation of cross-border mergers and acquisitions. This attention is attributable to the high-profile cases such as the 1998 acquisition of McDonnell Douglas by Boeing which created significant political conflict. The potential public and private benefits of estab-

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lishing an international merger control regime are attracting the attention of scholars, practitioners and regulators. The new proposals seek to address the additional public and private costs which are incurred as a result of overlapping national merger control regimes by creating some degree of harmonization and, in some cases, an international merger control authority with jurisdiction over cross-border transactions.

Although this paper follows on those new proposals, and addresses many of the same problems, the international merger control regime proposed here fundamentally differs in its approach. Although there is certainly a beneficial role for an international institution in merger control, the current proposals are too ambitious. Instead of focusing on the allocation of cross-border transactions, this paper suggests that the focus should be on the cases which present no threat to competition, and yet are scrutinized by several different national competition law regulators. An international institution, probably within the framework of the World Trade Organization ("WTO"), should be created to identify those jurisdictions where a particular concentration does not have a potential effect on competition. The proposal is based on the observation that there is a significant number of transactions which present no real threat to competition but nonetheless, because of the merger control thresholds employed by national merger control regimes, must be notified in and reviewed by regulatory agencies in several countries. Since most merger control regimes rely on sales volumes to delineate their sphere of application, competition regulators expend substantial resources reviewing transactions which present no real threat to competition. In addition, the firms involved in the transaction must commit substantial amounts of time and money to comply with such regimes. The idea presented here is to create an international merger control regime in the context of the WTO which would benefit both the parties and the national regulators and, at the same time, stand a realistic chance of being implemented.

II. THE NEED FOR AN INTERNATIONAL MERGER CONTROL REGIME

A. Globalization and Overlapping Merger Control Jurisdiction

One of the greatest challenges facing international antitrust is the high degree of jurisdictional overlap which exists between national competition

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3 Eleanor M. Fox, Can We Control Merger Control? – An Experiment, POL’Y DIRECTIONS FOR GLOBAL MERGER REV. 79 (1999).
law systems, and in particular, merger control regimes.\textsuperscript{7} The controversy between the United States and the European Union over antitrust approval of the acquisition of McDonnell Douglas by Boeing is sometimes cited as an example of why an international regime should be created.\textsuperscript{8} There are three factors which have contributed to the increase in overlap. The first factor is clearly the globalization of business. The process of globalization generally refers to the increase in cross-border trade and investment due largely to the reduction of traditional barriers to such activities.\textsuperscript{9} In 1998, for example, world-wide exports of merchandise and commercial services amounted to $6.5 trillion.\textsuperscript{10} Since competition law jurisdiction is generally based upon the territoriality principle,\textsuperscript{11} the geographic expansion of business activity, either by direct investment or exports, increases the potential exposure to multiple competition law systems. When MCI merged with WorldCom in 1997, for example, over 30 agencies reviewed the transaction.\textsuperscript{12}

Another factor contributing to the increase in the jurisdictional overlap between competition law systems is the increase in the number of countries which have adopted competition law systems. Many countries in Latin America\textsuperscript{13} and Eastern Europe\textsuperscript{14} have adopted some form of competition

\textsuperscript{7}The concept of jurisdictional overlap refers merely to the application of two or more sets of national competition laws to the same transaction or activity.

\textsuperscript{8}Fox, supra note 2; Alexander Schaub, International co-operation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings, 1998/1 EC COMPETITION POLICY NEWSLETTER 2, 4 ("A multilateral (for instance within the WTO) or bilateral arbitration mechanism (and to a greater degree a global antitrust authority), which would allow us to resolve case related conflicts and go beyond limitations imposed by the necessity for each competition authority to implement its own legal rules and to take primarily account of the specific market conditions and the consumer interests in the territory it polices, is inconceivable under the current circumstances.").


\textsuperscript{11}Cases 89, 104, 114, 116-7, 125-9/85, Åhlström v. Commission, 1988 E.C.R. 5193 para. 18; F.A. Mann, The Doctrine of Jurisdiction in International Law, 111 Recueil des Cours 9, 100 (1964); Werner Meng, Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht (1994).


\textsuperscript{13}William E. Kovacic, Institutional Innovations in Competition Policy in Peru: INDECOPI After Five Years, 1 INT’L ANTITRUST BULL. 34 (Summer 1998); Gabriel Castañeda and Fernando Sanchez Ugate, Mexico Still Setting the Pace for Latin America, 1 GLOBAL COMPETITION REV. 12 (Feb./March 1998).

\textsuperscript{14}See Marjo Ojala, THE COMPETITION LAW OF CENTRAL AND EASTERN EUROPE (1999); Michael G. Cowie and Monica Novotna, Premerger Notification in Central and Eastern Europe, 12 ANTITRUST 19 (Summer 1998); Carolyn Brzezinski, Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia and Hungary, 15 Mich. J.
law system in the last decade, often with the approval, if not at the behest
of, the United States and European Commission.\textsuperscript{15} Even the developing
countries of Southeast Asia\textsuperscript{16} and the People’s Republic of China\textsuperscript{17} are
beginning to adopt laws protecting competition.

There are various reasons for this trend. The increasing adoption of
competition law systems in Eastern Europe, in particular, can be traced to
the pre-accession strategies of countries in that region. In order to apply for
membership in the European Community, a candidate country’s legal and
economic systems must exhibit a certain degree of convergence with those
of the Member States of the European Community.\textsuperscript{18} Once an acceptable
degree of convergence is reached, the individual country will enter into a
formal pre-accession agreement with the European Community. Such
agreements typically impose specific obligations on that particular country
to adopt certain economic laws such as laws regulating competition.\textsuperscript{19} In
fact, for a number of years the Competition Directorate of the European
Commission has been working with a number of the candidate countries to
introduce and implement competition law systems.\textsuperscript{20}

\textsuperscript{15}See Karel Van Miert, \textit{Competition Policy in relation to the Central and Eastern Euro-
pean Countries – Achievements and Challenges}, 1998/2 EC COMP. POL’Y NEWSL. 1; Robert
McDermott, \textit{U.S. Officials Provide Competition Counseling to Eastern Europe}, 5 ANTITRUST
4 (Fall/Winter 1991); Shanker Singham, \textit{US and European models shaping Latin American
competition law}, 1 GLOBAL COMP. REV. 15 (Feb./March 1998).

\textsuperscript{16}William E. Kovacic, \textit{Capitalism, Socialism, and Competition Policy in Vietnam}, 13
ANTITRUST 57 (Summer 1999); William E. Kovacic, \textit{Merger Enforcement in Transition:
Antitrust Controls on Acquisitions in Emerging Economies}, 66 U. CIN. L. REV. 1075 (1998);
William E. Kovacic, \textit{Getting Started: Creating New Competition Policy Institutions in Transi-
tion Economies}, 23 BROOK. J. INT’L L. 403 (1997); Normin Pakpahan, \textit{Indonesia: Enact-
ment of Competition Law}, 27 INT’L BUS. LAW. 491 (1999); Whie-kap Cho, \textit{Korea’s
Economic Crisis. The Role of Competition Policy}, 27 INT’L BUS. LAW. 495 (1999); Sutee

\textsuperscript{17}Tianlong Yu, \textit{An Anti-Unfair Competition Law Without a Core: An Introductory Com-

\textsuperscript{18}See Commission, \textit{The Enlargement Negotiations after Helsinki}, MEMO/00/6 (Feb. 6,
2000). The formal requirements for accession are set forth in art. 49 of the Treaty on Euro-
pean Union, 1997 O.J. (C 340) 145.

\textsuperscript{19}For example, the “Europe Agreement” signed with Hungary specifically requires Hun-
gary to adopt competition laws approximating those of the EC, Europe Agreement between
the European Communities and their Member States, of the one part, and the Republic of
Hungary, of the other part, 1993 O.J. (L 347) 1, art. 68.

\textsuperscript{20}See, e.g., implementing rules for the application of the competition provisions appli-
cable to undertakings provided for in Article 33, paragraphs 1(i), 1(ii) and 2 of the Interim
Agreement between the EC and Poland, 1996 O.J. (L 208) 24; Maria Blässar and Joos
Stragier, \textit{Enlargement, 1999/1 EC COMP. POL’Y NEWSL. 58; Karel Van Miert, \textit{Competition
Policy in Relation to the Central and Eastern European Countries – Achievements and
In many other countries, particularly developing countries, the widespread acceptance and adoption of competition law systems can be explained - at least in part - by the isomorphic behavior of these countries. Many developing countries, in an attempt to stimulate their economies, have adopted laws similar to those of the developed countries. It is generally perceived that the adoption of competition laws is necessary to achieve the economic success witnessed in the developed countries which already have laws protecting competition. Ultimately, the globalization of business, combined with the spread of competition laws, increases the potential for overlap between the laws.

The third factor contributing to the overlap relates to the criteria used to delineate jurisdiction. The overlap between competition law regimes caused by globalization does not generally present an issue for the application of the laws governing behavioral restraints of competition. In most instances, such laws only apply when there is an actual effect on competition. There now seems to be a consensus that an effect on competition within a specific territory may constitute a legitimate nexus upon which to base jurisdiction over activities occurring outside of that territory. Instead, this factor is of relevance only for the overlap between merger control regimes. A merger control regime refers to the set of laws and procedures which are part of a competition law system, and which are used by competition regulators to prevent structural restraints of competition resulting from the change of control over firms. Such change of control transactions are referred to as concentrations in Europe and mergers in the United States.

Merger control laws are generally preventative in nature, i.e. they seek to prevent a structural restraint of competition prior to its occurrence. In order to effectuate this objective, a common component of most merger control regimes is a premerger notification requirement. Transactions fulfilling certain criteria must be notified to the regulators prior to their con-
summation. In many countries, the parties to the transaction are prohibited from consummating the transaction until a specified waiting period has expired or approval has been granted. The central challenge facing each merger control regime is to devise criteria identifying which concentrations or mergers fall within the scope of the premerger notification requirement.

The application of competition laws prohibiting behavioral restraints of competition is generally triggered by the occurrence of the event which constitutes the infringement. This is generally not the case with merger control regimes. Ideally, concentrations would have to be notified in advance only in those jurisdictions where, if implemented, the concentration would infringe the substantive law applicable to the transaction. In the context of the European Community, for example, this would mean that only those concentrations which create or strengthen a dominant position in the Community would have to be notified to the Commission. In reality, however, it is difficult to codify workable rules which adequately achieve this result. A merger control regime which requires premerger review of only those transactions which, if implemented, would infringe the substantive prohibition is impractical from the perspective of the regulators. Their position is that such a criterion would allow too many transactions to escape their scrutiny. Moreover, in most jurisdictions outside the United States, the authority of the regulators to intervene against a concentration or a merger is coextensive with the scope of the merger control regime. In Germany, for example, the Bundeskartellamt cannot intervene against a concentration as a structural restraint of competition unless the transaction falls under the premerger notification thresholds set forth in section 39 of the German Act Against Restraints of Competition. Therefore, any reduction in the scope of the merger control regime would result in a reduction in the number of transactions which the regulators could challenge.

The scope of the premerger notification requirement is generally not limited to transactions which “substantially lessen competition” or “create or strengthen a dominant position.” Instead, most merger control regimes containing a premerger notification requirement employ surrogate criteria. This reliance on surrogate criteria to delineate the jurisdictional reach of merger control regimes exacerbates the overlap between those regimes. The typical surrogate criterion is the sales volumes of the parties involved in the transaction. Argentina, Austria, Belgium, the European Community, France, and Norway require premerger notification if the parties involved exceed specified thresholds.

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27 Sechstes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Neu- fassung des Gesetzes gegen Wettbewerbsbeschränkungen, v.7.5.1998 (BGBl. I-2512). In Germany, a concentration must be notified in advance if the combined world-wide sales of all the undertakings concerned is DM1 billion and at least one of those undertakings has sales in Germany of at least DM50 million.
Germany, Hungary, Italy, Poland, the Netherlands and Switzerland, for example, each rely exclusively on sales volumes to delineate the scope of their premerger notification requirement. Obviously, the exclusive reliance on sales volumes generously expands the jurisdictional reach of the merger control regime. The competition regulators are often required to review transactions which have no anti-competitive effect in their territory. For example, the exclusive reliance by the European Community on sales volumes means that the European Commission is forced to expend administrative resources on transactions which, by the Commission’s own admission, have no possible effect on competition in the European Community.\(^{28}\)

Other merger control regimes, for example Canada, Ireland, Mexico, South Korea, and the United States, rely on a combination of assets and sales volumes to identify which transactions must be notified to the authorities. For example, the Irish Competition Act requires notification if at least two parties each have gross assets of IR10 million (approximately $12 million) or at least two parties each have sales of IR20 million (approximately $24 million).\(^{29}\) These criteria also expand the scope of the merger control regime because they are only indirectly related to the anti-competitive effect which the substantive law is designed to prevent.

Since merger laws are generally concerned with the concentration of economic power,\(^{30}\) one would think that the premerger notification regimes would rely on market shares to delineate their scope. In reality, however, very few premerger control regimes have adopted a market share criterion. The initial Belgian premerger control regime, for example, required a 25 percent market share in Belgium before a transaction had to be notified.\(^{31}\) However, the law proved difficult to implement and was recently amended. According to the new law, a concentration must be notified to the Belgian Competition Council prior to its consummation if the firms involved in the transaction have combined annual sales in Belgium of EUR40 million or more and at least two of the firms each have EUR15 million in annual sales.

Some merger control regimes such as those in Greece, Portugal, Spain, Taiwan and Turkey rely on a combination of sales and market shares to


\(^{31}\) For an English translation of the initial Belgian law prior to its amendment see Belgian Protection of Economic Competition Act, 1992 Eur. Comp. L. Rev. 1 (Supplement 1). For further discussion, see Peter Jacob, Merger Control in Belgium, 20 INT'L BUS. LAW 157 (1992).
identify which transactions must be notified in advance. In Portugal, for example, a concentration must be notified if it creates or strengthens a market share of 30 percent. However, none of these jurisdictions relies exclusively on market share. In other words, the market share threshold is merely an alternative which triggers the premerger notification requirement. Premerger notification may be required in these countries if certain sales volume thresholds are met or exceeded even if the parties to the transaction have insignificant market shares.

Many countries have recognized that the reliance on surrogate criteria has expanded the scope of premerger control regimes to transactions which present no threat to competition within their territory. There are several ways in which countries have responded. The United States has adopted exemptions from the premerger notification requirements for "transactions having only a limited nexus with United States commerce." For example, all acquisitions of foreign assets by a foreign person are exempt from the premerger notification requirement regardless of the amount of sales into the United States attributable to those assets. Acquisitions of United States assets by foreign persons may also be exempt if the value of the assets (excluding investment assets) acquired is less than $15 million. The exemptions arise from the recognition that the "principal impact" of such transactions will in most cases be outside of the United States, and "it is [therefore] appropriate for the agency in its discretion to exercise a self-imposed limitation and decline to subject them to the act’s requirements."

Other countries such as Austria have amended their thresholds in an attempt to limit the notification requirement to those transactions which have an effect on competition in their respective countries. Prior to this

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33 In Greece, for example, a notification is required if the combined sales in Greece exceed ECU50 million and at least two of the parties each has sales in Greece exceeding ECU5 million. In Portugal, annual sales of ESC30 billion (approximately $146 million) are all that is needed to trigger the premerger filing requirement regardless of the market shares of the entities involved. In Spain, combined annual sales in Spain exceed PTA40 billion (approximately $234 million) and at least two of the parties had sales in Spain of at least PTA10 billion (approximately $59 million).


35 16 C.F.R. §802.51(a)(1999).

36 16 C.F.R. §802.51(c)(1999).

37 Statement of Basis and Purpose, 43 Fed. Reg. 33451, 33495 (1978). Argentina recently adopted a similar (albeit narrower) exception to its premerger notification regime. The acquisition of an Argentinean company by a foreign company is not subject to the notification requirement if the foreign company did not previously own assets in Argentina or shares in an Argentinean company. See Rafael Dargo, Juan Arocena & Dante Ramos, *Argentina’s New Antitrust Law*, 2(3) INT’L ANTITRUST BULL. 24, 25 (Winter 1999).
year, the Austrian premerger control regime required notification of a concentration if the annual combined sales of the parties involved in the concentration was at least AS3.5 billion (approximately $270 million) and the annual sales of at least two of the undertakings concerned was at least AS5 million (approximately $385,000). Using these thresholds, an acquisition by Sony of Japan of a South African grocery store would have technically had to be notified to the Austrian Kartellgericht even though the transaction would have no effect in Austria. In 1999, however, the Austrian legislature revised the thresholds in an attempt to narrow the notification requirement only to those concentrations which have a potential effect in Austria. Under the current law, premerger notification is required only if the aggregate world-wide sales of all “undertakings concerned” is at least AS4.2 billion (approximately $306 million), the aggregate Austrian sales of all undertakings concerned is at least AS210 million (approximately $13 million) and at least two of the undertakings concerned have world-wide sales of at least AS28 million (approximately $2 million). Nonetheless, under the current law, the acquisition by America Online of a local trucking company in Chicago with sales of over $2 million would, for example, still fall under the Austrian merger control regime even though there is no chance of an anti-competitive effect in Austria.

These examples merely illustrate that the reliance on “surrogate” criteria to delineate the scope of merger control regimes creates the potential for overlap between such regimes. As businesses increase their sales beyond their national borders, and as more countries adopt merger control regimes, the potential for overlap increases. The public and private costs associated with this overlap call for a solution.

B. Costs of Overlapping Merger Control Jurisdiction

Overlapping merger control jurisdiction results in significant public and private costs. First, the application of multiple merger control regimes to the same transaction imposes substantial compliance costs on the firms involved in the transaction. In each transaction, the firms must expend resources to determine whether a filing is required in each of the jurisdictions

41 The Austrian premerger notification thresholds have been criticized in Austria because of its potential to include such transactions. See Viktor Thurnher, Kartellrecht 2000 – Der österreichische Weg, 49 WIRTSCHAFT UND WETTBEWERB 1080, 1084 (1999); Johannes Barbist/Girsch, Die Kartellgesetznovelle 1999 als Regierungsvorlage, 10 ECOLEX 410 (1999); Johannes Barbist & Ivo Rungg, Neues in der österreichischen Fusionskontrolle nach der KatGNov. 1999, 11 ECOLEX 51, 52 (2000).
where they (or, in the case of the acquiring party, the group to which the acquiring entity belongs) has assets or sales. This, in itself, is a time-consuming and costly process.\textsuperscript{42} For example, one observer, based on various interviews with practitioners, estimates the legal fees associated with obtaining clearance under the European Merger Control Regulation to be between ECU76,000 and ECU152,000.\textsuperscript{43} Once the individual countries where premerger notification is required or advisable are identified, the individual filings must be prepared. Since each country has its own notification forms and requirements, this is an equally cumbersome and costly process.\textsuperscript{44}

Second, the increase in overlap between merger control regimes imposes costs on the regulators. In the face of shrinking budgets, regulatory efficiency has become an important goal in many jurisdictions. The administrative and financial resources being made available to the competition regulators are strained as regulators attempt to respond to the challenge presented by globalization.\textsuperscript{45} For example, the European Commissioner for

\textsuperscript{42}For a discussion of the procedures firms generally follow in making this determination, see Adam Frederickson, \textit{A Strategic Approach to Multi-jurisdictional Filings}, 4 EUR. COUNSEL 23 (Dec. 1999/Jan. 2000). In many instances, the answer to this question may not be clear. Many pre-merger control regimes are new and the regulators have little experience in applying them. In the case of Mexico, for example, during the first years after the Mexican merger control regime was adopted, the lack of guidance notices and case law made determination of the necessity of a pre-merger notification very difficult. If a firm sought guidance from the Mexican Federal Competition Commission, the response was typically that the parties should notify. For a discussion of the Mexican experience see Michael Wise, \textit{Review of Competition Law and Policy in Mexico}, 1 OECD J. COMP. L. & POL'Y 44, 82 (Dec. 1999); Allan Van Fleet, \textit{Mexico's Competition Policy: Lessons for Developing Economies}, 1 GLOBAL COMP. REV. 23 (April/May 1998).


\textsuperscript{44}Although France, Germany and the UK have adopted a common pre-merger notification form, available at \url{http://www.bundeskartellamt.de/anmeldeformular_in_gb.html}, it does not replace any formal notification in France or in the United Kingdom. Consequently, it is not being used by practitioners. In addition, the OECD's Committee on Competition Law and Policy has proposed a common form to alleviate the burdens associated with multiple filings using different notification forms, OECD, Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL (Feb. 23, 1999). However, this proposed common form has not been integrated into any merger control regime.

\textsuperscript{45}See, e.g., John Nannes, Deputy Assistant Attorney General, Antitrust Divisions, U.S. Dept. of Justice, Last Year and This Year: The View from the Antitrust Trenches, Address to the Antitrust Law Section of the New York State Bar Association Annual Meeting (Jan. 27, 2000) ("We spend a good deal of time worrying about resource allocation. The Antitrust Division has just weathered a difficult attack on its budget. Nevertheless, we remain severely constrained. We currently employ 361 attorneys which, by way of contrast, is significantly less than the 456 attorneys employed by the Antitrust Division 20 years ago. The Antitrust Division's budget for FY 2000 is $110 million. That is an increase over FY 1999 expenditures but, after annual non-discretionary cost increases and anticipated litigation costs are
Competition Policy, Mr. Mario Monti, recently stated that the European Commission would strive to achieve more efficient enforcement by focusing on "the essentials," i.e., "cases which have a real Community interest and which raise serious competition issues." 46 The situation in the U.S. is no different. Robert Pitofsky, Chairman of the U.S. Federal Trade Commission, recently concluded in his testimony before the U.S. Senate Subcommittee on Antitrust, Business Rights, and Competition that "the merger wave strains the FTC resources to the breaking point." 47

The reliance on surrogate criteria in merger control regimes such as sales volumes requires the regulators to review many concentrations which present no real competition issues. One recent survey has shown that at least 95 percent of merger transactions which are reportable transactions under a merger control regime do not infringe the substantive prohibition. 48 Although it is difficult to estimate precisely, it is safe to conjecture that a good portion of these transactions have no effect in some of the jurisdictions in which they are notified. The annual costs of reviewing premerger notifications for transactions which have no effect in the United States have been estimated at over $1 billion. 49 The review of such cases is a waste of scarce administrative resources particularly if the same transaction is being reviewed by other competition regulators. For example, when Nestlé USA and The Pillsbury Company decided to contribute certain assets located in

46 Mario Monti, Speech given at the formal introduction ceremony of the new President of the Bundeskartellamt (Jan. 13, 2000), SPEECH/00/6, at 3. See also Mario Monti, Modernisation of E.U. Competition Rules, SPEECH/00/64 (Mar. 2, 2000); Michelle Cini & Lee McGowan, Competition Policy in the European Union 223 (1998) ("It seems clear that the Commission will face numerous challenges as it seeks to improve its competition enforcement into the twenty-first century... On the one hand, there are the challenges of effectiveness. This questions DGIV's capacity to cope with the enormous case responsibilities while remaining focused on policy outcomes. The main issue is, as ever, that of resources."); Michael Wise, supra note 42, at 44 ("The budget stringency may be impeding work, to some extent, as the total budget per employee for 1997 was only about half what it was in 1994.")

47 Prepared Statement of the Federal Trade Commission to the U.S. Senate Subcommittee on Antitrust, Business Rights, and Competition, Mar. 22, 2000, at 3. See also Statement of Joel Klein before the U.S. Senate Subcommittee on Antitrust, Business Rights, and Competition, Mar. 22, 2000; John Nannes, Deputy Assistant Attorney General, Antitrust Divisions, U.S. Dept. of Justice, Last Year and This Year: The View from the Antitrust Trenches, Address before the Antitrust Law Section of the New York State Bar Association Annual Meeting (Jan. 27, 2000) at 5.


the United States to a joint venture in the United States, the parties were
forced to notify the transaction to the European Commission as well as the
U.S. Department of Justice and Federal Trade Commission. The Euro-
pean Commission was consequently forced to give a decision in the case in
which it admitted "that the notified operation will have no impact on com-
petition in the EEA."5

Finally, overlapping merger control jurisdiction imposes political costs
in the form of jurisdictional conflicts. As the high-profile McDonnell
Douglas/Boeing case aptly illustrates, the political value of premerger ap-

roval decisions combined with the inability to precisely and objectively
define an unacceptable structural restraint of competition makes the appli-
cation of merger control rules vulnerable to political interference. In many
instances, the application of merger control rules may appear to be influ-
enced by political or industrial policy objectives. In such cases, the appli-
cation of multiple merger control regimes to the same transaction may lead
to political conflict between the politicians in the country which approves
the transaction and the politicians in another country which prohibit the
same transaction.

III. THE FAILURE OF PREVIOUS PROPOSALS TO ESTABLISHING AN
INTERNATIONAL COMPETITION LAW REGIME

There has been no shortage of attempts to create an international com-
petition law regime. None of the proposals have been implemented and
their prospects look rather bleak. Although international enforcement co-

50 1999 O.J. (C 260) 2.
51 Case No IV/M.1689, Nestlé/Pillsbury/Häagen-Dazs US, Commission Decision of Oc-
tober 6, 1999, at 8.
52 See, e.g., Catherine Yang, When Protectionism Wears Camouflage, Bus. Wk., June 2,
1997, at 60. See also Edmund Andrews, European Regulators Frown on a Combined MCI-
Sprint, N.Y. TIMES, Feb. 22, 2000 at C4 (Speculating that one possible reason for additional
European concern is that European companies cannot keep pace with the U.S.).
53 See, e.g., Havana Charter for an International Trade Organization, arts. 46-54, U.N.
Doc. E/Conf. 2/78 (1948), reprinted in U.S. Dep't of State, Pub. No. 3206, at 86-91 (1948);
OECD, Declaration on International Investment and Multinational Enterprises of June 21,
1976, reprinted in 15 I.L.M. 967 (1976); UNCTAD, The Set of Multilaterally Agreed Equi-
table Principles and Rules for the Control of Restrictive Business Practices, UN Doc.
TD/RBP/CONF/10, reprinted in 19 I.L.M. 813 (1980); International Antitrust Code Working
Group, Draft International code as a GATT-MTO Plurilateral Trade Agreement, July 10,
54 See, e.g., Interview with Ulf Böge, President of the German Cartel Office, Frankfurter
Allgemeine Zeitung E.AZ., Dec. 27, 1999, at 14; Antitrust Division Official Predicts Scant
Prospect of International Code, 11 INT’L TRADE REP. (BNA) 220 (Feb. 9, 1994); OECD
Committee Lacks Enthusiasm for Draft International Antitrust Code, 10 INT’L TRADE REP.
ordination seems to be working, the general consensus is that an international competition law regime, or even substantive harmonization, is not on the horizon. The primary difficulty remain convincing the politicians that such steps are in the national interest. Given the divergent interests of nations, this is an extremely difficult task. Earlier attempts to create an international competition law regime have, for example, failed because the United States refused to throw its weight behind such efforts. Although the Europeans have recently promoted an international competition law regime in an attempt to address the political conflict resulting from overlapping national jurisdictions, the United States remains unconvinced that such a regime is necessary or desirable.

Secondly, the politicians and regulators would have to be persuaded that such steps were in their personal interests. Politicians and regulators

56 Götz Drauz & Thalia Lingoς, The Treatment of Trans-Border mergers in the 1990's: A European Perspective, POL'y DIRECTIONS FOR GLOBAL MERGER REV. 55, 58 (1999); Joel I. Klein, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Transcript of speech at The Royal Institute of International Affairs, London, Nov. 18, 1996; A Douglas Melamed, Antitrust Enforcement in a Global Economy, 1998 ANNUAL PROCEEDINGS OF THE FORDHAM CORP. L. INST. 1 (1999); William J. Baer, International Antitrust Policy, 1998 ANNUAL PROCEEDINGS OF THE FORDHAM CORP. L. INST. 247 (1999); Interview with Ulf Böge, President of the German Cartel Office, Frankfurter Allgemeine Zeitung, Dec. 27, 1999, p. 1; Leserbrief von Dieter Wolf — Präsident des Bundeskartellamtes, available at <http://www.bundeskartellamt.de/fazbriefe.html>. Alexander Schaub, International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings, 1998/1 EC COMP. POL'y NEWSL. 2, 4 ("A multilateral (for instance within the WTO) or bilateral arbitration mechanism (and to a greater degree a global antitrust authority), which would allow us to resolve case related conflicts and go beyond limitations imposed by the necessity for each competition authority to implement its own legal rules and to take primarily account of the specific market conditions and the consumer interests in the territory it polices, is inconceivable under the current circumstances.").
57 For a discussion of the difficulties on achieving a political consensus in the face of divergent national interests, see Andrew T. Guzman, Is International Antitrust Possible?, 73 N.Y.U.L. REV. 1501 (1998).
are generally reluctant to relinquish sovereignty over competition decisions, and in particular merger approval decisions, to an independent supranational body. Decisions in large merger cases have significant political value. They can be used to impose costs on companies from outside a politician's jurisdiction or prevent unemployment associated with the downsizing which almost invariably follows a merger. Even if the political use of merger control laws is not beneficial to the interests of the shareholders of the company, in most instances, the shareholders are not the constituents. Therefore, the ability to block a merger or at least seek concessions from the company carries significant political value for national and local politicians. The political value of merger approval decisions was clearly apparent in the Boeing-McDonnell Douglas case.

Any proposals to create an international competition law regime must take these political realities into account. In the past, the inability to achieve the requisite political consensus on establishing an international competition law regime was due partly to the fact that the proposals were over-ambitious. Each would have necessitated the relinquishment of a certain degree of sovereignty over cases with political value. The attractiveness of a competition law regime from the perspective of the politicians can be enhanced if the necessary relinquishment of sovereignty is limited, at least initially, to cases with low political value.

All merger cases, even those with no anti-competitive effect, carry some political value. If, for example, two companies in the U.S. planned to merge and thereby realize certain efficiencies which would give the merged entity a competitive advantage over a competitor in Japan who imports into the U.S., the ability to block the transaction would be of value to the Japanese politician in whose district the Japanese competitor was based. The value to the Japanese politician would exist regardless of whether the transaction had an anti-competitive effect in Japan. However, the political use of merger decisions in such cases is much more difficult to disguise as the legitimate application of the merger control laws. It would be extremely difficult to block a merger unless there is some appreciable anti-competitive effect in the country concerned. Therefore, the national politicians are much more willing to relinquish control over such transactions.

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IV. THE CREATION OF THE WTO PREMGER CONTROL REGIME

A. Fundamental Objective of the WTO Premerger Control Regime

The political and economic costs resulting from increasing overlap between premerger control regimes suggest that there may be a role for a supranational premerger control regime. The proposal here is to create a premerger control office in the framework of the WTO (the "WTO Premerger Office") with the authority to review certain international concentrations. However, the political realities which have undermined earlier efforts at an international competition law regime limit the authority which such an office can be granted. The purpose of creating a WTO Premerger Office would not be to usurp the sovereignty of the national regulators over concentrations or mergers. In fact, the authority of the WTO Premerger Office could not extend to a substantive review of the transaction. Moreover, it would have to be limited to a review of the cases with insignificant political value. The objective of the WTO Premerger Office would be to assist business and regulators by identifying those transactions which present no threat to competition.

The institution proposed here could technically operate independently or in the context of another international institution. However, the WTO is probably the most appropriate framework in which to implement an international merger control regime. Not only is the WTO already equipped with the institutional structure which could readily absorb the Premerger Office, it is generally perceived as an objective decision-making institution staffed with professionals and it represents a greater array of interests than other organizations such as the OECD. That mantle of legitimacy would serve to make the WTO Premerger Office more effective. Moreover, the WTO Premerger Office may serve as a precursor to future efforts to create an international competition law regime integrated into the world trading system. Accordingly, the WTO is generally accepted as providing

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the appropriate framework in which to achieve an international competition law regime.  

B. The Essential Components of the WTO Premerger Control Regime

The creation of the WTO Premerger Office and implementation of the WTO premerger control regime would be based on several essential components. The first component would be to identify its tasks. The fundamental task of the WTO Premerger Office would be, for a particular transaction, to identify the jurisdictions in which the transaction would have no effect on competition although a premerger notification is required. In other words, the WTO Premerger Office would act as a “filter” for competitively insignificant concentrations which otherwise would have to be notified in several jurisdictions. It is important to note that it would not be the task of the WTO Premerger Office to opine on the permissibility of a concentration under the applicable substantive laws or even determine whether a transaction was notifiable in a particular jurisdiction. As discussed above, the reliance on surrogate criteria to delineate the scope of the merger control regimes results in the notification of transactions which present no threat to competition. In practice, there are a significant number of cases which any reasonable observer could identify as being irrelevant from a competition law perspective. It would be the task of the WTO Premerger Office to filter these out and thereby avoid the public and private costs associated with filings which are unnecessary from a substantive competition law perspective. The goal is not to prevent one state from reviewing a merger which raises anticompetitive concerns or to allocate cases between jurisdictions, but rather relieve the parties and the regulators from the burden of reviewing inconsequential transactions.


65 Although competition regulators generally recognize a transaction usually has a “natural centre of gravity” upon which to base the allocation of jurisdiction, see Götz Drauz & Thalia Lingos, The Treatment of Trans-Border mergers in the 1990’s: A European Perspective, POL’Y DIRECTIONS FOR GLOBAL MERGER REV. 55, 58 (1999), it would be difficult to
The success of this proposal is based on the notion that it is much easier to identify those transactions which present no threat to competition in a particular geographic area than to identify those transactions which should be prohibited because of their potential effect on competition. In fact, this “filtering” task is already being done informally by national regulators. The European Community, for example, relies extensively on the concept of “affected market” to filter out the cases which present no threat to competition. In the U.S., the Federal Trade Commission relies on the Premerger Notification Office (“PNO”) to initially assess whether a particular transaction should be reviewed in greater detail. In most cases, the civil servants at the PNO can readily identify those transactions which are of no interest to the competition regulators. Although it is difficult to formalize, many other jurisdictions rely on some sort of filter to identify which transactions justify their serious attention. Such task should be shifted to the WTO Premerger Office for concentrations which would otherwise have to be notified in several jurisdictions.

The second essential component of the WTO premerger control regime would be rules governing its jurisdiction. The WTO Premerger Office would have jurisdiction over those transactions which are notifiable in more than one jurisdiction and which are voluntarily notified to it by the parties. As indicated above, the responsibility for identifying the jurisdictions in which a particular transaction is notifiable would remain with the parties. Once the jurisdictions were identified by the parties, they would have the option of submitting filings in each of those jurisdictions, or submitting one filing to the WTO Premerger Office. In the notification to the WTO Premerger Office, the parties would have to specify (and substantiate their specifications) the jurisdictions in which the transaction would be notifiable. The decision of the WTO Premerger Office would only cover those specified jurisdictions. However, the parties would have to notify the transaction to the WTO Premerger Office before notifying a national agency. Otherwise, the disposition of the national authorities would influence the decision of the parties to the WTO Premerger Office.

The third essential component would be an agreement by the participating countries to abide by the decision reached by the WTO Premerger Office. This could be achieved by the codification of an exemption in each

convince national politicians to grant such authority to an independent, supranational institution.

66 See Form CO Relating to the Notification of a Concentration Pursuant to Regulation 4064/89, 1998 O.J. (L 61) 11, 19 (EEC). An affected market is a relevant market in the Community in which two or more of the parties to the concentration are engaged in business activities and where the concentration would lead to a combined market share of 15 percent or more, or a market in the Community in which one or more of the parties to the concentration are engaged in business activities, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares is 25 percent or more.
national merger control regime for transactions which the WTO Premerger Office determined had no effect in its area. For example, many of the European national merger control regimes already have such provisions in favor of the European Merger Control Regulation.\textsuperscript{67} Although the initial notification by the parties to the WTO Premerger Office would be voluntary, the system would soon prove to be ineffectual unless the national competition regulators were prevented from reviewing a transaction which had been reviewed by the WTO Premerger Office. The danger of forum shopping would be minimized because the WTO Premerger Office would only have the authority to determine the jurisdictions in which there is no effect. Assuming that there is no competitive effect in a particular jurisdiction, the parties would have no incentive to forum shop and avoid that jurisdiction in the first place.

The requirement that the participating states relinquish a certain degree of sovereignty would not necessarily condemn this proposal to the same destiny as past attempts to establish an international competition law regime. There would be relatively little political value in the cases over which the WTO Premerger Office had jurisdiction. As indicated above, the sole task of the WTO Premerger Office would be to identify those jurisdictions in which there is no anti-competitive effect. The lack of an anti-competitive effect will generally mean that the public and private cost savings will exceed the value of the decision-making authority to the politicians. Accordingly, the chances of achieving a political consensus to create an international premerger control regime are greater.

Another essential component of the WTO premerger control regime would be the inclusion of an exemption for cases in which a participating state can substantiate that, for certain legitimate reasons, it should be allowed to review a transaction that had been notified to the WTO Premerger Office. This exemption would be essential to achieve the political consensus required to insure the success of the proposal.\textsuperscript{68} The specific standard used in the exemption could be similar to the "important interests" standard.


\textsuperscript{68}For example, the exemption provided for in Article 9 of the Mergers, Takeovers and Monopolies Control Act, see supra note 29, which, under certain circumstances, allows the national authorities to review a transaction which otherwise was within the exclusive jurisdiction of the European Commission because necessary to garner the support of the German government in the adoption of the Regulation. For further discussion, see Simon Hirsbrunner, \textit{Referral of Mergers in E.C. Merger Control}, 20(7) \textsc{Eur. Comp. L. Rev.} 372 (1999).
used in the antitrust enforcement cooperation agreements between the US and the EU.\textsuperscript{69}

The real challenge is identifying in a particular case which interests are legitimate. Clearly one interest would have to be the potential anti-competitive effect of the transaction in that state contrary to the conclusions of the WTO Premerger Office. In other words, the participating state could overrule the decision of the WTO Premerger Office. In addition, non-competition policy concerns such as industrial, environmental and employment policies would have to be recognized. If, for example, the WTO Premerger Office decided that a transaction did not have a potential effect in a particular country, and yet that country considered the transaction to have important environmental policy implications, that country could still apply its own merger control regime to the transaction.

It might appear at first that the exception creates the potential for abuse by the participating states. In reality, however, there are two factors which indicate that it is unlikely that the exception would be abused. First, the participating state would have to demonstrate that its legitimate interests are at stake. Second, the participating states would have no substantial incentive to rely on the exception. Since the WTO Premerger Control Office would have jurisdiction only over insignificant concentrations, most states would not be interested in such transactions. Moreover, if the WTO Premerger Control Office concluded that a transaction would have no effect in a particular jurisdiction, it would be difficult for regulators in that jurisdiction to prohibit the transaction.

Nonetheless, the WTO premerger control regime could adopt some mechanism to prevent the abuse of the exemption. One way to limit the illegitimate use of the exemption would be to preclude reliance upon it by those countries in which neither of the parties has a market share above a certain level; 10 percent for example. It is highly unlikely that a country will have a legitimate interest in prohibiting a transaction in which neither of the parties has a market share over 10 percent.

In order to make its decision, the WTO Premerger Office would have to collect a certain amount of information to allow it to assess the structure of the relevant markets. Several authors have already identified the components of a common form which could be utilized to collect the necessary information.\textsuperscript{70} In fact, last year the Organization for Economic Cooperation

\textsuperscript{69} See Agreement of September 23, 1991 between the Government of the United States of America and the Commission of the European Community regarding the application of their competition laws, 1995 O.J. (L 95) 47; 30 I.L.M. 1491 (1991); Agreement of June 4, 1998 between the Government of the United States of America and the Commission of the European Community regarding the application of positive comity principles in the enforcement of their competition laws, 1998 O.J. (L 173) 28.

\textsuperscript{70} J. William Rowley & A. Neil Campbell, \textit{Multi-Jurisdictional Merger Review – Is It Time for a Common Form Filing Treaty?}, \textsc{Pol'y Directions for Global Merger Rev.} 9
and Development published a "Framework for a Notification and Report Form for Concentrations" which could be used in a modified form by the WTO Premerger Office. In the event that the WTO Premerger Office concluded that the transaction would have an effect in certain jurisdictions, the information collected and compiled in the WTO notification could be used at the national level. In other words, the participating states would have to adopt the standardized form for transactions which are reportable in more than one jurisdiction.

C. Disadvantages of a WTO Merger Control Regime

Critics of a WTO merger control regime may argue that a regime which merely identifies the jurisdictions in which a transaction would have no effect will serve to add another layer of regulation to those transactions which are notified to it and actually do have an effect. It is correct that such transactions would then have to be notified to and reviewed by the respective national regulators. The consummation of the transaction would then be further delayed because the parties would have to respect the applicable waiting periods. It is important to note, however, that the merger control regime proposed here would be voluntary. It would be the unilateral decision of the parties to notify their transaction to the WTO Premerger Office. If the costs associated with the potential for additional delay exceed the costs of notifying the transaction in jurisdictions in which it has no effect, then the parties would be advised to forego the WTO Premerger Office and notify their transaction directly to the national regulators.

Another potential shortcoming of this proposal concerns the difficulty in defining the standard used by the WTO Premerger Office in reviewing transactions. As indicated above, the basic task of the WTO Premerger Office would be to identify those jurisdictions in which the proposed transaction would not have an anti-competitive effect. One could argue, however, that the national merger control regimes employ different substantive standards of review. The existing merger control regimes may be divided into three categories based on their substantive standard of review: (1) regimes which prohibit the creation or strengthening of a dominant position, (2) regimes which prohibit the substantial lessening of competition and (3) regimes which consider both the effect on competition and other policy

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concerns. In each case, however, there must be an effect on competition within the jurisdiction. In some instances, this effect is imposed by the applicable law itself. However, even if the national law does not expressly codify this requirement, the generally accepted basis of jurisdiction under international law in competition law cases requires an effect within that territory. Therefore, the WTO Premerger Office would be determining the existence of something which each premerger control regime requires at a minimum.

V. CONCLUSION

Globalization and the widespread acceptance of the benefits of laws regulating competition have resulted in substantial overlap between national competition law regimes. This overlap is particularly apparent in the context of merger control. Because merger control regimes rely on sales volumes and other criteria only indirectly related to the harm which they are designed to prevent, they often apply to transactions which have no negative effect on competition in the relevant territory. It is not uncommon that parties to a transaction which presents no anti-competitive effect must nonetheless incur the costs of notifying that transaction in a number of jurisdictions. In most instances, such cases are filtered out by the national regulators at an early stage. Nonetheless, a significant amount of public and private resources must be expended along the way. An international institution with the function of identifying the jurisdictions in which a particular transaction will have no anti-competitive effect would result in public and private savings and allow the regulators to focus their resources on more difficult cases. This proposal is based, in part, on the realization that it is much easier to identify which merger will not be of legitimate concern to national regulators than to identify which mergers will be of legitimate concern for national regulators. Not only would it be difficult for a supranational institution to identify which mergers will amount to a structural restraint of competition in individuals countries, it is unlikely given the political value of merger decisions that national politicians would relinquish control over such cases. It is much more realistic to expect national politicians to agree to relinquish control over cases which have no anti-competitive effect in their territory, but which, because of the nature of the criteria employed by merger control regimes, must nonetheless be notified to and reviewed by the regulators. This realistic, relatively modest proposal


could then perhaps serve as the basis for a much broader international competition law regime.